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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS LEDESMA,

Defendant and Appellant.

F057069

(Super. Ct. No. F08900852)

# OPINION

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge. (Retired judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Cornell, Acting P.J., Gomes, J., Dawson, J.

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## INTRODUCTION

On May 8, 2008, appellant was charged in a second amended felony complaint with over 190 felony counts of elder theft (Pen. Code, § 368, subd. (d)),[1] identity theft (§ 530.5, subd. (a)), attempted identity theft (§§ 664, 530.5, subd. (a)), second degree burglary (§§ 459, 460, subd. (b)), receiving stolen property (§ 496, subd. (a)), and attempting to dissuade a witness (§ 136.1, subd. (a)(2)). Over 140 counts alleged a gang enhancement (§ 186.22, subd. (b)(1)). Appellant entered into a plea agreement with a sentencing lid of 16 years. On appeal, appellant contends the trial court abused its sentencing discretion in fashioning a sentence that was, in essence, the lid. We disagree and will affirm the trial court's judgment.

## STATEMENT OF THE CASE

On May 8, 2008, appellant entered into a plea agreement in which he would admit all of the allegations of the complaint in return for an "indicated" sentence of 16 years. Appellant executed a felony advisement, waiver of rights, and plea form acknowledging and waiving his constitutional rights pursuant to *Boykin*/*Tahl*.[2] Appellant stipulated the police reports could be used to establish the factual basis for his plea. Appellant waived his constitutional rights in court and pled nolo contendere to all of the felony allegations. Additionally, the misdemeanor count of identity theft (count 201) was dismissed.

On November 10, 2008, the parties agreed the felony count for dissuading a witness (count 202) and the gang enhancements would be dismissed. The parties concurred that appellant's sentence of 16 years would be a lid. The court noted that appellant's sentence had "always been a lid." The court noted defense counsel could argue for a shorter prison term.

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1 All statutory references are to the Penal Code.

2 *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

The probation officer reported that between July 2004 and March 2008, appellant used identity theft on the accounts of 53 victims. Appellant would contact the victims by phone claiming to be doing a security check on the victims' accounts. When appellant obtained identity information from the victims, he would make purchases on their credit and debit cards. In some instances, appellant would request that victims leave their cards under their front door mats or in their mail boxes. Appellant and his codefendants opened accounts in the victim's names, bought computers, opened cell phone accounts, and sent cash to Western Union. Several victims were elderly. Restitution was calculated at $41,791. The probation officer noted there were 53 victims and listed their names.[3] Nearly 20 victims (including some couples) wrote letters to the court concerning the negative impact of appellant's crimes on their lives.

Appellant had adjudications as a juvenile for taking or stealing a vehicle, misdemeanor resisting arrest, and misdemeanor burglary. Appellant had a felony conviction as an adult for having intercourse with a minor and being three years older than the minor.

The probation officer noted the following aggravating factors: appellant was convicted of other crimes for which consecutive sentences could have been imposed, the manner in which the crime was carried out indicated planning and sophistication, the crime involved attempted or actual taking of great monetary value, the appellant took advantage of a position of confidence, appellant's prior convictions or sustained juvenile

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[3] There are couples listed in the probation report account of the victims. If all the victims are counted individually, there were 58 victims. Two of these victims, M.G. and S.H., were listed in five counts (counts 53, 54, 55, 56, 57) in which appellant was not an alleged perpetrator. S.H. is apparently listed in the probation report by an incorrect last name. Count 202 involving victim L.M. was dismissed prior to sentencing and should not have been listed in the probation report. A Quick Mart store in count 86 is a victim not listed in the probation report. Appellant stands convicted of offenses against at least 55 individuals and a business. Out of deference to the victims' age and the fact they have already suffered identity theft, in some instances several times, we do not state their names in our opinion.

adjudications are numerous or of increasing seriousness, and appellant's prior performance on probation or parole was unsatisfactory. The only mitigating factor was appellant's early acknowledgment of wrongdoing.

At the sentencing hearing on December 19, 2008, defense counsel argued for a sentence of 13 years. The court noted that some of the victims were devastated by appellant's conduct. The court also noted that 43 of the 53 victims were elderly. The court found that 16 years was an appropriate sentence for 53 victims. Referring to letters written to the court by many of the victims, the court observed that the monetary, emotional, and physical damage to the victims was significant.

The court observed that appellant had a criminal past, had chances given to him, and found himself in court for sentencing again. The court stated that given the number and age of the victims, a 16-year sentence was appropriate. The court found the following additional aggravating factors: appellant admitted numerous counts for which the court could impose consecutive sentences; the manner in which the crimes were committed indicates considerable planning, sophistication, and professionalism; the victims suffered emotional and physical damage in addition to monetary loss; to some degree a position of trust was violated because appellant preyed on the victims' emotions and fears; appellant had prior convictions. The court found appellant's early admission of culpability to be the only mitigating factor.

The court pronounced count 54 as the base term and imposed a sentence of four years on that count.[4] The court imposed consecutive one-third the base term, one year, on eight counts of elder theft (counts 11, 21, 37, 46, 62, 152, 176, 185) and consecutive one-third the base term, or eight months, on seven counts of identity theft (counts 56, 65, 69, 70, 73, 84, 90). The court noted by its calculation, appellant's sentence was 16 years 8 months. The court then decided to stay appellant's sentence on count 90, which

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[4] Count 54 alleged that appellant's codefendant, Gilbert Roland Chavez, committed identity theft. Appellant was not a named defendant in count 54.

reduced appellant's sentence by eight months for a total sentence of 16 years. The court's sentences on the remaining counts were either made concurrent to his prison term or were stayed pursuant to section 654.

At a hearing on December 24, 2008, the court explained there were errors in its sentence and made corrections. The court noted it sentenced appellant on counts 53, 54, 55, 56, and 57 but he had not been charged in those counts. The court explained it could not use count 54 as the principal term. Although appellant admitted counts 5, 51, 66, 170, and 201, the court granted a motion by the prosecutor to dismiss those counts. The court sentenced appellant to the upper term of four years for elder theft on count 152, making that count the principal term. The court left the rest of its sentencing order intact. The court stated it could have found a way to give appellant a sentence of 16 years, but sought instead to clean up the errors. The court referred to the small abatement in appellant's sentence as "a small Christmas present." Appellant's total sentence is 15 years 8 months.

## DISCUSSION

Appellant contends the trial court abused its sentencing discretion because it fashioned a sentence that was, in essence, the lid. Appellant argues there was insufficient evidence in the record to base a review for abuse of discretion and the factual record was thin, the trial court was wrong about the number of victims, and imposition of the high term on the principal count and consecutive terms on the other counts violated the prohibition against dual use of facts. We reject these arguments and affirm the judgment.

### *Review of Factual Basis for Sentencing*

Appellant's initial attack on the trial court's sentence is the insufficiency of the evidence in the record to base review and the thin factual basis in the record. Appellant agreed the factual basis for his plea was contained in the police reports. The police reports are not part of the record on appeal. If there was mitigating evidence in the police reports relevant to the sentencing hearing, it is incumbent on the appellant to make these documents part of the record. It is a procedural and substantive requirement on the part

of any party prosecuting an appeal or asserting a position on appeal. Judgments and orders are presumed correct, and the party attacking a judgment or order has the burden of affirmatively demonstrating error. The appellant has the burden of furnishing an appellate court with a record sufficient to consider the issues on appeal. An appellate court's review is limited to consideration of the matters contained in the appellate record. (*People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534.)

A guilty plea is, for most purposes, the legal equivalent of a jury's guilty verdict. (*People v. Valladoli* (1996) 13 Cal.4th 590, 601.) A guilty plea serves as a stipulation that the People need not introduce proof to support the accusation. The plea ipso facto supplies both evidence and verdict and is deemed to constitute an admission of every element of the charged offense. (*People v. Alfaro* (1986) 42 Cal.3d 627, 636 [overruled on another ground in *People v. Guerrero* (1988) 44 Cal.3d 343]; *People v. Chadd* (1981) 28 Cal.3d 739, 748.) A plea of nolo contendere (or no contest) is legally equivalent to a guilty plea and also constitutes an admission of every element of the offense pled. (*People v. Warburton* (1970) 7 Cal.App.3d 815, 820-821.) We, therefore, reject appellant's assertion that the factual basis of his plea is somehow insufficient for appellate review of his sentence.

***Number of Victims***

Appellant argues there are inaccuracies in the probation report as to the number of victims. There are at least 55 individuals who were defrauded by appellant. Some of these victims were couples. As noted by the court at sentencing, all of them suffered financially, emotionally, and physically. One victim not listed in the probation report is a Quick Mart store. The count of victims defrauded by appellant in the probation report and the court appears to be lower than the actual number. Even if appellant's calculation of only 50 victims is accurate, the difference is a minor deviation from the total number of victims and the total number of victims is very high in this case.

***Alleged Dual Use of Facts***

Appellant argues the court violated the doctrine of dual use of facts in imposing the upper term on count 152 and making the remaining counts consecutive sentences. Appellant states the court never referred to appellant's record as a basis for its sentencing decision and relied on the age and vulnerability of the victims which are elements of section 368, subdivision (d). The court, however, did refer to appellant's prior criminal record during the sentencing hearing and, although it did not expressly recite it as an aggravating factor moments later in the hearing, the court clearly considered appellant's criminal record in its sentencing decision. The court also considered appellant's sophistication in committing the offense to be an aggravating factor. The court also made reference several times to the large number of victims, which, by our reckoning, exceeded the number of victims set forth in the probation report. We find no dual use of facts by the court in imposing the upper term sentence on the principal count and sentencing appellant consecutively for the other counts.

Finally, even if the trial court improperly imposed a sentence upon a dual use of the same fact, no prejudice occurs in the resulting sentence where it is not reasonably probable that a more favorable sentence would have been imposed in absence of the error. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) If we were to read the record as appellant does and conclude that the trial court did not rely on appellant's past criminal conduct in its sentencing decision, appellant's criminal record would be available and the trial court would likely reach the same sentence on remand. Appellant has not demonstrated prejudice.

***Trial Court's Broad Sentencing Discretion***

In reviewing a trial court's sentence for abuse of discretion, we are guided by two fundamental precepts. First, the burden is on the party attacking the sentence to clearly show the sentencing decision was irrational or arbitrary. In the absence of such a showing, the trial court is presumed to have achieved proper sentencing objectives. Second, a trial court's decision will not be reversed merely because reasonable people

may disagree over the sentencing decision. Appellate courts are not authorized nor warranted in substituting their judgment for that of the trial court. Together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Appellant had a prior criminal record as a juvenile and an adult. Appellant engaged in crimes that involved professionalism and sophistication. As respondent points out, appellant was the "ring leader" of these crimes and got others to be involved with him. Appellant stole over $40,000 in assets from his victims. The number of victims was very high. Appellant caused great harm to the community, not just a few individuals. Also, the court sentenced appellant to a term less than the lid of 16 years. Appellant has failed to establish that the trial court abused its discretion in sentencing him.

**DISPOSITION**

The judgment is affirmed.